SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 622

BROTHERHOOD OF RAILROAD TRAINMEN, LODGE No. 514, ET AL.,

Petitioners

v.

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Norfolk and Portsmouth Belt Line Railroad Company, hereinafter designated as respondent, respectfully submits that certiorari should be denied for the following reasons:

1. The petition shows no facts indicating that this Court should exercise its discretion in a manner favorable to the petitioners.

2. The question raised by the petition for certiorari was not raised in the pleadings, was not raised in the District Court, and was not raised in the United States

Court of Appeals for the Fourth Circuit until after that Court had rendered its opinion reversing the District Court, and holding that the respondent is entitled to the injunction. Thereafter petitioner filed in that Court a petition for a rehearing, in which the same question was raised. The rehearing was denied.

3. Nothing whatever will be accomplished by granting certiorari, even if the decision of the United States Court of Appeals for the Fourth Circuit is reversed.

FACTS

The United States Court of Appeals for the Fourth Circuit, in its opinion, quoted verbatim in petitioners' appendix, set forth clearly and accurately the essential facts; but respondent believes that the facts, as there stated, should be supplemented as follows:

First, it desires to quote Section 42 of the complaint as amended, which reads as follows:

> "42 (Amended). Before claims can be submitted to the National Railroad Adjustment Board they must be handled on the property in the usual manner up to and including the highest operating officer of the carrier designated to handle claims, in this case the President of complainant. The complainant has negotiated with defendants concerning its proposed changes under the jurisdiction of and with the help of the National Mediation Board, and the parties have never reached an agreement. The defendants have not made any claim or alleged any grievance in connection with or arising out of the proposed change in operations. Therefore, there has been no opportunity to handle any claim or grievance. In spite of the differences of opinion, the complainant hoped and believed that when the changes were announced that

the defendants would comply therewith. Until they refused to comply, it had no grievance or complaint and, therefore, nothing to submit to the National Railroad Adjustment Board. The notice from the defendants of their intention to strike, which was received on the afternoon of September 24, 1956, is the first affirmative notice it has received and the defendants would not comply with its orders. In the time which will intervene between the receipt of the notice and the effective date and hour of the strike it is impossible to submit the controversy to the National Railroad Adjustment Board. The complainant intends to submit the matter to said Board at the earliest possible date. It avers that the work stoppage or strike should be enjoined or restrained in order to keep the railroad in operation pending a final determination of such matters, in accordance with the orderly processes of the Railway Labor Act."

Second, it calls attention to the fact that the time which would have elapsed between the receipt of the strike notice in the afternoon of September 24, 1956, and the effective date of the proposed strike was less than 48 hours, in which time it would have been impossible to submit the controversy to the First Division of the National Railroad Adjustment Board.

In its complaint the respondent asked only for a temporary injunction at the time the suit was filed, coupled with an application for a permanent injunction to be granted after a full and complete hearing.

The only injunction granted up to this time is the temporary injunction.

The permanent injunction is yet to be granted, as a result of the opinion of the United States Court of Appeals for the Fourth Circuit.

ARGUMENT

1. THE PETITION SHOWS NO FACTS JUSTIFYING CERTIORARI.

Granting or denying certiorari is a matter within the sound judicial discretion of the Court, and such discretion will be exercised in granting certiorari only where there are special and important reasons therefor. (Rule 19). The same rule, while not purporting to be all inclusive, indicates the character of reasons which are to be considered.

If there are any facts constituting "special and important reasons" they should be set forth in the petition for certiorari. None is set forth in this petition.

2. THE QUESTION INVOLVED WAS NOT RAISED IN THE DISTRICT COURT OR THE UNITED STATES COURT OF APPEALS.

It is axiomatic that appellate courts will not decide questions not submitted to the trial court, save in very unusual circumstances. There are no unusual circumstances in this case.

Virtue v. *Creamery Package Co.* (1913) 227 U. S. 8 was an action under the Sherman Act. The facts are in nowise analogous to the case at bar, but a portion of the opinion of this Court is applicable. We quote from pages 38 and 39 of the opinion:

> "But plaintiffs urge that the Creamery Package Manufacturing Company was of itself a combination offensive to the statute and that they were entitled to go to the jury as to that company. But the contention was not made in the Circuit Court nor was it made in the Circuit Court of Appeals. The case was tried and ruled upon, as we have seen, on the ground

of the cooperation of the defendants in a scheme of monopoly and restraint of trade. * * *. It is manifest, therefore, that the separate liability of the Creamery Package Manufacturing Company is an afterthought and urged in this court for the first time."

This Court refused to consider that point.

A similar question was considered by the United States Court of Appeals for the Seventh Circuit in 1955, in a patent case, *Hazeltine Research Co.* v. *Avco Mfg. Corp.*, 227 Fed. (2) 137, 139. The Court in its opinion stated that the first reason advanced by Avco to sustain its contention that the reissue claims in issue were invalid, is that they were granted through "factual technical error." The Court further stated that Avco cited certain evidence in the record which it claimed showed that an amendment to the claims made the claims factually incorrect.

Evidently the plaintiff objected to consideration of that point by the Court of Appeals, and in connection therewith, the Court of Appeals said:

> "We agree with plaintiff that this contention is not properly before us for determination. Avco's answer and counterclaim make no specific reference thereto, nor is there anything in the record to indicate that this issue was presented to the district court. While Avco in its reply brief states that the issue was covered in its proposed findings of fact and conclusions of law, no submitted finding or conclusion specifying that issue has been included in the record before us. Avco in its brief states that the district judge made no specific findings on this issue. We are not surprised at that statement in view of the total failure of the record before us to show that that issue was ever raised in that court. Therefore, we cannot consider it here." (P. 139).

Certiorari was denied. 350 U. S. 987, 76 S. Ct. 474, 100 L. Ed. 854.

An examination of the record shows that although respondent, in paragraph 42 of its complaint as amended, stated that there had been no submission to the Adjustment Board because of lack of time, and stated further, an intention to submit the matter to said Board, petitioners in their answer did not raise the question now presented, and the District Court did not mention that fact in its opinion.

However, the District Court did mention the fact that the matter had been submitted to the Adjustment Board, although the District Judge did not consider the matter of any importance. The applicable language taken from the opinion is:

> "* * *. While the carrier had not submitted the matter in controversy to the Adjustment Board as of the date of the injunction, the Court has been verbally advised that, since the time of argument, the carrier has presented something to this Board, the details of which are not material to a determination of the carrier's right to an injunction." (Respondent's brief, Appendix I, p. 53).

Reference to respondent's brief filed in the United States Court of Appeals for the Fourth Circuit, page 10, et seq., will show that respondent specifically and emphatically relied on the fact that the controversy had been submitted to the Adjustment Board and was then pending before it.

While respondent relied on many other points, the brief shows that one of its main reliances was on that fact, especially in view of the decision of this Court in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana*

R. R. Co., 353 U. S. 30, 77 S. Ct. 635, 1 L. Ed. (2) 622, and *Marion* v. *Kansas City Terminal Rwy. Co.*, 353 U. S. 927, 77 S. Ct. 706, 1 L. Ed. (2) 722.

In *Chicago River*, this Court, in the first paragraph of its opinion, stated:

> "* * *. The ultimate question is whether a railway labor organization can resort to a strike over matters pending before the Adjustment Board."

After making that statement, it decided that a strike in such circumstances was illegal.

In *Marion*, this Court, in a single paragraph, vacated an injunction granted by a Missouri Court "because the dispute here is not pending before the National Railroad Adjustment Board. * * *."

In these circumstances, respondent considered it of the utmost importance to convince the United States Court of Appeals that the matter was pending before the Adjustment Board and that it was entitled to an injunction for that reason alone.

In spite of all this, petitioners ignored that point completely. It is not mentioned in their brief and was not mentioned in the oral argument of the case on the merits.

The United States Court of Appeals considered that fact to be of some moment and, in its opinion, stated:

> "Thereafter the carrier submitted the controversy to the National Railroad Adjustment Board. That proceeding is now pending." (Appendix 25a).

Petitioners relied entirely on other grounds; three in number, as follows:

1. "The dispute between the parties is negotiable." (Petitioners brief, p. 8).

2. "This dispute does not involve the interpretation of a contract or rule so as to be within the jurisdiction of the National Railroad Adjustment Board." (Petitioners brief, p. 20).

3. "The appellees, having complied with the procedural requirements of the Railway Labor Act, had the right to strike when enjoined by the State Court." (Petitioners brief, p. 29).

Petitioners were content to ignore respondent's contention and to take their chances on securing a favorable decision from the United States Court of Appeals on the grounds mentioned.

After that Court rendered its opinion, petitioners filed a petition for a rehearing, based solely on the same question here presented, and that was the first and only time such a question had been raised.

3. NOTHING WHATEVER WILL BE ACCOMPLISHED BY GRANTING CERTIORARI, EVEN IF THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IS REVERSED.

Petitioners argue that the injunction was illegal when granted, solely because the matter was not then pending before the Adjustment Board, and having been illegally granted, it can never become legal. Stated differently, they argue that even though the matter is now before the Adjustment Board, the strike cannot be enjoined.

They lose sight of the fact that the injunction granted was a temporary one, granted to preserve, for a reason-

able time, the status quo, in order that the controversy might be submitted to the Adjustment Board. In their petition for a rehearing in the United States Court of Appeals (p. 5, et seq.) they called attention to the fact that in *Manion* this Court authorized the reinstatement of the injunction if the question were *thereafter* submitted to the Adjustment Board. They approved of that action by this Court. The following paragraph is quoted from page 6 of their petition:

> "*This was an altogether reasonable and proper disposition in view of the fact that the National Mediation Board had not had an opportunity before the injunction was issued to exert its influence to persuade the parties to settle their grievances,* and the further fact that preparing an accumulation of one thousand disputes for submission to the Adjustment Board is a task requiring time. *Hence, the Supreme Court preserved for a 'reasonable time,' the status quo in order that the carrier might have the opportunity to invoke the jurisdiction of the Adjustment Board with the same results that attended the submission of the disputes* to the Adjustment Board in the *Chicago River* case, to-wit, for forfeiture on the part of the employees of their right to withdraw from service." (Italics added)

If we assume for the sake of argument that this Court should grant certiorari and should reverse the decision of the Court of Appeals solely on the ground that the matter was not pending before the Adjustment Board when the temporary injunction was granted, what will the result be?

The matter is now pending before the Adjustment Board and it unquestionably has sole and exclusive jurisdiction to interpret the rule or contract. There is nothing to prevent respondent from starting a new suit and ask-

ing for an injunction at this time to prohibit the strike, upon the ground that the controversy is pending before said Board.

In view of this Court's ruling in *Chicago River*, supra, such an injunction will certainly be granted.

Without bringing a new suit, when the case is remanded, respondent can file an amended and supplemental complaint making the same allegation and with the same result. *Texarkana* v. *Arkansas Gas Co.*, 306 U. S. 188, 203, and *Manion*, supra.

In *Texarkana*, the Court had occasion to deal with a situation involving a change of circumstances since the initiation of the suit. In fact, the change in that case came *after* the decision in the District Court. The right which enured to the appellant by reason of such change in circumstances had not come into effect when the supplemental petition had been filed. This Court held that the petition was premature as to so much of the relief as was based on the changed circumstances. It said:

> "*The present action is an appropriate proceeding for the settlement of the entire rate controversy and the refund of such sums as may be determined, ultimately, to be due the Texas consumers.* **Where there is a good cause of action stated in the original bill, a supplemental bill setting up facts subsequently occurring which justify other or further relief is proper.** *If the original decree in the trial court had not been entered, this supplemental petition would simplify the controversy. We think this procedure is equally applicable after remand for further proceedings.*" (Italics supplied).

In *Manion*, supra, the Supreme Court was even more specific.

Having vacated the judgment of the Court below in the first sentence of its opinion, it said in the second and final sentence thereof:

> "* * *. *The cause is remanded for further proceedings not inconsistent with this decision and without prejudice to the power of the Court of Appeals to reinstate its judgment if the dispute is submitted to the Adjustment Board by either party within a reasonable time.*" (Italics supplied).

Respondent's position in this respect is even stronger than the carrier in *Manion*.

In *Manion* the case had not been submitted to the Adjustment Board up to the time the petition for certiorari was filed in this Court.

In the case at bar it had been submitted to the Adjustment Board before the District Court rendered its opinion and respondent relied on it throughout.

The only possible defect in respondent's case is that the fact of submission to the Adjustment Board was not alleged in the complaint.

In remanding *Manion*, all that this Court required as a condition precedent to reinstatement of the injunction was that the controversy be submitted to the Adjustment Board within a reasonable time. It did not require any amendment of the pleadings.

CONCLUSION

Respondent respectfully submits that certiorari should be denied.

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